Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates	ET Docket No. 98-206; RM-9147, RM-9245
In the Matter of	
Petition for Rulemaking to Amend Eligibility Requirements in Part 78 Regarding 12 GHz Cable Television Relay Service; and	CS Docket No. 99-250; RM-9257
In the Matter of	
Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems	ET Docket No. 00-258

PETITION FOR CONSOLIDATION OF RULEMAKING PROCEEDINGS AND FOR A DECLARATION THAT ALTERNATIVE SPECTRUM IS SUITABLE FOR THE PROPOSED "MULTICHANNEL VIDEO DISTRIBUTION AND DATA SERVICE"

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SUMMARY

DIRECTV, Inc. ("DIRECTV") and EchoStar Satellite Corporation ("EchoStar", together the "DBS Operators") oppose Northpoint's proposal to operate in the DBS band, not out of fear of competition, but out of a desire to keep millions of DBS customers free from harmful interference. In a spirit of constructiveness, not obstruction, the DBS operators ask the Commission to consider housing Northpoint's proposed service in the Cable Television Relay Service ("CARS") band, and hereby request consolidation of the above-captioned pending proceedings, relating to the 12.2–12.7 GHz Direct Broadcast Satellite ("DBS") band and the immediately adjacent 12.7–13.2 GHz Cable Television Relay Service ("CARS") band. In the DBS Operators' view, thinking "outside the box" of each of these two bands and considering them together will help provide a fair and expeditious resolution of both of these proceedings.

Furthermore, in light of the Commission's recent decision to preserve the viability of the Instructional Television Fixed Service ("ITFS") and Multichannel Multipoint Distribution Service ("MMDS"), the DBS Operators ask the Commission to declare that the ITFS/MMDS (together, "MMDS") spectrum is also a suitable alternative for the new "multichannel video distribution and data service" ("MVDDS") proposed by Northpoint Technology, Ltd. ("Northpoint") and others.[1] Either of these outcomes would allow Northpoint and other proponents to get on with their business plans and potentially introduce new competition in the Multi-Channel Video Programming Distribution ("MVPD") market, without causing electrical interference and jeopardizing the welfare of millions of DBS households.

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[1] Other bands already allocated to point-to-multipoint terrestrial services, such as the 29 GHz Local Multipoint Distribution Service ("LMDS") band, the 24 GHz Digital Electronic Messaging Service ("DEMS") band and the 38 GHz band, remain available as potential homes for the service proposed by Northpoint and others.

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DIRECTV, Inc. ("DIRECTV") and EchoStar Satellite Corporation ("EchoStar", together the "DBS Operators") oppose Northpoint's proposal to operate in the DBS band, not out of fear of competition, but out of a desire to keep millions of DBS customers free from harmful interference. In a spirit of constructiveness, not obstruction, the DBS operators ask the Commission to consider housing Northpoint's proposed service in one of several suitable frequency bands, including the Cable Television Relay Service ("CARS") band, and the

Multichannel Multipoint Distribution Service ("MMDS") band. The DBS Operators hereby request consolidation of the above-captioned pending proceedings.

I. BACKGROUND

Northpoint and other companies have requested Commission authority to provide a terrestrial wireless cable service that would operate on a secondary basis in the 12.2-12.7 GHz frequency band used by EchoStar and DIRECTV to provide DBS service to millions of households.[2] After conducting tests required by Congress, the MITRE Corporation has concluded that such a new service would threaten "significant interference" to the DBS service, and that the benefit of any mitigation methods must be weighed against their cost as well as the interference that would remain.[3]

Throughout the Northpoint proceedings, one question has remained essentially unanswered: why can't Northpoint's business plan be accommodated in different spectrum? Northpoint's explanation has not been convincing: in Northpoint's view, frequency bands such

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[2] *See In the Matter of Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to Provide A Fixed Service in the 12.2-12.7 GHz Band,* Further Notice of Proposed Rulemaking, ET Docket No. 98-206, RM-9147, RM-9245, 16 FCC Rcd. 4096 (2000), at ¶ 261, n.534 ("Northpoint Report and Order and FNPRM") (citing Northpoint's Petition for Rulemaking (filed Mar. 6, 1998)).

[3] *See "MITRE Technical Report: Analysis of Potential MVDDS Interference to DBS in the 12.2-12.7 GHz Band,"* MITRE Corporation, April 2001, at xvi and 6-1. MITRE Corporation was tasked by the Commission to perform the congressionally mandated independent tests of the proposed technology to determine whether such systems would cause interference to incumbent DBS systems, pursuant to "Prevention of Interference to Direct Broadcast Satellite Services," Section 1012(b), Pub. L. No. 106-553, 114 Stat. 2762, 2762A-344 (2000).

as the 29 GHz Local Multipoint Distribution Service ("LMDS") band or the 2.5 GHz Multichannel Multipoint Distribution Service ("MMDS") band are unsuitable for its service, either because the frequencies are too high and do not have good propagation characteristics (in the case of LMDS) or because the band does not contain sufficient spectrum (in the case of MMDS).[4] Northpoint has also argued that it needs to operate in the DBS band to ensure compatibility of its equipment with DBS set-top boxes.[5]

In the DBS Operators' view, none of these arguments holds up to serious scrutiny. The Commission has already found, for example, that the LMDS band is suitable for wireless cable operations and has auctioned it on that basis.[6] Technology has helped overcome the signal attenuation issues associated with the Ka-band, and in any event the LMDS spectrum is ample – double that available to DBS providers, and more than enough to compensate for any propagation problems. As for the MMDS frequencies, while they offer less spectrum, they can still accommodate as many as two hundred channels by digital compression.[7] In addition, the

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[4] *See, e.g.,* Northpoint Technology, Ltd. and Broadwave USA, Inc. Opposition to Petitions for Reconsideration of First Report and Order, ET Docket No. 98-206, (filed Apr. 24, 2001), at 7-8.

[5] *See id.* at 8.

[6] *See, e.g., In the Matter of Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and For Fixed Satellite Services*, 11 FCC Rcd. 19005 (1996), at ¶ 14 ("LMDS Order") (discussing range of potential video services to be provided in LMDS spectrum).

[7] *See* "Spectrum Study of the 2500 - 2690 MHz Band," FCC Interim Report at 19 (Nov. 15, 2000) ("Although the ITFS/MDS spectrum traditionally was used for one-way analog video transmission, the communications industry is rapidly taking advantage of Commission service rule changes to permit the use of the 2500 - 2690 MHz band for very high speed, fixed wireless broadband services. The Commission's July 1996, *Digital Declaratory Ruling* permitted licensees to digitize their MDS and ITFS spectrum. With this Commission ruling and the (Continued ...)

MMDS band in fact has far superior propagation characteristics to DBS, as it is significantly lower than the DBS band and, as will be discussed below, the Commission recently removed the doubts about the continued availability of that spectrum. Moreover, equipment compatibility is not a function of what spectrum is used to receive the signals. In any event, Northpoint has abandoned the idea of offering its service as a complement to DBS service,[8] and it is therefore not clear why it is concerned about equipment compatibility.

The DBS Operators respect Northpoint's business plan and its willingness to have a go at becoming a new competitor in the MVPD market. That plan, however, could be accommodated in spectrum other than the DBS band. In fact, the inadequacy of Northpoint's explanations as to why other spectrum does not work may lay bare the true motive behind Northpoint's interest in the DBS band – to obtain spectrum for free. Specifically, Northpoint's plea for free licenses is based on arguments having to do with the DBS spectrum. The DBS Operators have repeatedly shown that these arguments lack merit. Northpoint is essentially trying to create for itself a "pioneer's preference" based on its "idea" for alleviating interference into DBS systems, even though Congress has chosen to abolish pioneer's preferences, and even though independent testing has shown that idea (transmitting from the north) to actually *worsen* interference. As for the ORBIT Act, that law's prohibition on auctions for satellite services does not apply to terrestrial services on its face. In fact, Northpoint's perverse reading of the ORBIT

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advances in digital technology, ITFS/MDS video providers can now deliver as many as 200 channels of programming.") (citations omitted).

[8] *See* Northpoint Report and Order and FNPRM at ¶ 263 ("in applying for licenses as a non-DBS affiliate, Northpoint shifted its stance from its earlier petition for rule making and also expanded the scope of suggested video offerings beyond local service to supplement DBS.") (citation omitted).

Act would throw the entire auction program into disarray, because no licenses for any terrestrial service could be auctioned in any of the numerous bands that also have a satellite service allocation. In sum, the statutory auction provision of 47 U.S.C. § 309(j) applies to all terrestrial services in any spectrum, with some exceptions that do not apply here. If Northpoint is sincerely interested in serving the public subject to the statutory constraint of having to bid for its licenses in the event of mutual exclusivity, all frequency bands that are suitable for its service should be considered.

II. THE CARS SPECTRUM IS SUITABLE FOR NORTHPOINT-TYPE SERVICES

The CARS proceeding that is also pending before the Commission offers the promise of accommodating Northpoint in an alternative band that answers *all* of Northpoint's purported concerns, whether they are well-founded or not. The CARS spectrum is immediately adjacent to the DBS spectrum and has the same propagation characteristics. It is certainly enough for Northpoint's stated plans – 500 MHz compared to 500 MHz of DBS spectrum. Moreover, it is used much more sparsely than the DBS frequencies, and only for *non*-ubiquitous point-to-point or point-to-multipoint services – mostly microwave transmission of programming to cable headends, as well as Broadcast Auxiliary Service.[9] The CARS spectrum is *not* today used directly by consumers.[10] It therefore does not present the virtually insurmountable interference problems that the Commission has repeatedly recognized when it comes to sharing

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[9] *In the Matter of Petition for Rulemaking to Amend Eligibility Requirements in Part 78 Regarding 12 GHz Cable Television Relay Service*, Notice of Proposed Rulemaking, 14 FCC Rcd. 11967 (1999), at ¶ 2 ("CARS NPRM").

[10] *See id.* at ¶ 2 n. 8 (describing the current CARS service as not including "transmissions to multiple, unspecified receiving locations").

between two ubiquitous consumer services.[11] Also, in view of the relatively light use of the band, a company such as Northpoint will not have to heavily restrict the number of possible sites

[11] For example, in the proceeding establishing LMDS, the Commission concluded that "co-frequency sharing between either GSO/FSS or NGSO/FSS ubiquitously deployed terminals and LMDS with its ubiquitously deployed subscriber terminals, is not feasible at this time." LMDS Order, 11 FCC Rcd. 19005, at ¶ 27. The Commission reached the same determination when it decided to relocate the digital electronic message service ("DEMS") from the 18 GHz band. And as recently as June of last year, the Commission adopted a further Order segmenting the 18 GHz Band between terrestrial fixed services, the downlinks of geostationary fixed satellite service (very similar to the DBS downlinks for purposes of interference analysis), and non-geostationary satellite services. In doing so, the Commission emphasized that:

> The vast majority of the commenters agreed with our tentative conclusion that co-frequency sharing between terrestrial fixed service and ubiquitously deployed FSS earth stations in the 18 GHz band is not feasible, and that the public interest would be best served by separating these operations into dedicated sub-bands. We continue to believe that separation of these operations into different dedicated sub-bands is an effective frequency management technique to resolve problems of coordinating terrestrial fixed service links with ubiquitously deployed satellite earth stations.

In the Matter of Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use, Report and Order, IB Docket No. 98-172 (rel. June 22, 2000), at ¶ 17.

Finally, the Commission reached the same conclusions with respect to the idea of co-frequency sharing in the 39 GHz Band, noting that there "is wide support for the premise that the types of fixed and satellite services likely to be offered in spectrum above 36 GHz will not be able to share the same spectrum blocks." *In the Matter of Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands; Implementation of Section 309(j) of the Communications Act – Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz*, Report and Order and Second Notice of Proposed Rulemaking, 12 FCC Rcd. 18600, ¶ 8 (1997); *see also In the Matter of Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands; Implementation of Section 309(j) of the Communications Act – Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, Memorandum Opinion and Order, 14 FCC Rcd. 12428, ¶ 49 (1999). "Against this backdrop," the Commission concluded that "some form of band segmentation will be required to accommodate planned services in the spectrum above 36 GHz." *Id.*

for its towers to avoid interference into the millions of DBS households, and will enjoy significantly greater flexibility in locating its towers so as to reach as many consumers as possible. Therefore, the line-of-sight problem that Northpoint would encounter in the DBS band would be significantly alleviated in the CARS spectrum.

Indeed, the light use of the CARS band, which may be due to the correspondingly increasing use of fiber optic transmission by cable operators, appears to be one of the factors that led the Commission to commence the CARS rulemaking.[12] The Commission has already placed in question in that proceeding the issue of opening up the CARS band for broader use by non-cable multichannel video programming distributors ("MVPDs"). As the Commission has explained:

> [O]n our own motion, we broaden this Notice to include consideration of the expanded use of the 12 GHz CARS band by other MVPDs. One of the Commission's most important goals is to promote and facilitate competition in the video distribution market, and, therefore, we seek comment on whether other types of MVPDs could use the CARS band to compete more effectively with cable systems and the other MVPDs that are currently eligible to use the CARS band.[13]

While the CARS NPRM stopped short of proposing that the CARS band be opened up for ubiquitous consumer use, it did seek comment on whether MVPDs can operate successfully in the band under the existing technical and operational requirements.[14]

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[12] *See* CARS NPRM at ¶ 18.

[13] *See id.* at ¶ 4. EchoStar continues to support the Commission's proposal to extend CARS eligibility to all MVPDs regardless of delivery technology.

[14] *See id.* at ¶ 5. As EchoStar already argued in its Comments in that proceeding, the Commission should reassess this restriction on ubiquitous point-to-multipoint operations, particularly in light of the increasing availability of the CARS band. Lifting the restriction

(Continued ...)

Finding a home for Northpoint is integrally related to the issues that the Commission has already raised in the CARS proceeding. Sharing the CARS band between a consumer service and a decreasing number of microwave operations is infinitely easier than achieving sharing in a band used by millions of households. Coordination with a few CARS links in each area should be manageable. In fact, Northpoint has always proposed operating its system on a non-interference basis,[15] and such operation is truly feasible when all the interference that needs to be avoided relates to only a few links. Finally, the CARS band provides an ideal way for the Commission to proceed cautiously and license a Northpoint-type service only in a few geographical areas – perhaps areas where the CARS band now experiences only very light use. With the benefit of the experience from such limited operations, the Commission can make more informed determinations about the viability, spectrum needs and broader licensing of such a service.

III. THE MDDS SPECTRUM TOO IS SUITABLE FOR THE PROPOSED SERVICE

The CARS band is not the only suitable spectrum available for a Northpoint-type service. In that respect, the Commission's recent decision in the MMDS proceeding has helped remove any doubt that the MMDS spectrum will remain available for point-to-multipoint fixed services.[16] In light of that decision, there is also no doubt that the 2,500–2,690 MHz band is

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would also be consistent with the principle that the marketplace should be given maximum flexibility in determining the best use of a frequency band.

[15] *See* Northpoint Report and Order and FNPRM at ¶ 263.

[16] ET Docket No. 00-258, *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, RM-9911, *Amendment of the U.S. Table of Frequency Allocations to Designate the 2500-2520/2670-2690*

(Continued ...)

suitable for the services proposed by Northpoint. Indeed, the Commission's MMDS allocation was designed precisely to accommodate a wide range of point-to-multipoint fixed services, including services such as Northpoint's. In the Commission's words:

> Historically, the 2,500-2,690 MHz band has been predominantly used for one-way analog video transmission. Increasingly, ITFS/MMDS operators are using the band for two-way digital broadband services. Our July 1996 *Digital Declaratory Ruling* first permitted digital use of the band. In October 1996, we allowed high-speed digital data applications, including Internet access. In 1998, we approved the use of two-way transmissions, effectively enabling the provision of *voice, video, and data services.*
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> * * * * * * * *
>
> Specifically with regard to ITFS/MMDS, we already have provided licenses with additional operational flexibility. First, in 1995 we expanded the protected service area contour for site-based MMDS licensees from a 15 mile radius to a 35 mile radius. Second, in 1996 we implemented rules for the use of digital modulation schemes, thereby allowing ITFS/MMDS licensees to provide multiple channels of video programming and high-speed data applications such as Internet access. Third, in 1998 we authorized the use of two-way transmissions on ITFS/MMDS frequencies, effectively enabling the provision of *voice, video and data* services and granted a 35-mile protected service area to every ITFS licensee. With the advent of two-way technology, ITFS/MMDS has become a vehicle for offering high-speed Internet access and broadband service to educational, residential and small office/home office customers.

The Commission's decision also makes clear that the MMDS spectrum has decidedly superior propagation characteristics to any band above 3 GHz, including of course the

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MHz Frequency Bands for the Mobile-Satellite Service, FCC 01-256 (rel. MMDS Order at ¶ ¶ 8, 21. Sept. 24, 2001) ("MMDS Order").

12.2-12.7 GHz DBS band.[17] This superiority answers Northpoint's professed concern about the propagation characteristics of alternative spectrum. Accordingly, the Commission's decision against relocating MMDS incumbents from the 2,500-2,690 MHz band makes that band a very suitable home for the services proposed by Northpoint and others, and the Commission should confirm this.

Thus, the CARS and MMDS bands both constitute very suitable homes for the new proposed service. Of course, many other bands already allocated to the point-to-multipoint terrestrial services, such as the DEMS band, the LMDS band and the 38 GHz band, continue to be suitable alternatives for the service.[18]

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[17] *See* MMDS Order at ¶ 11 ("relocation of ITFS/MMDS operations to a band above 3 GHz would affect deployment of these systems because of changes in signal propagation in higher bands.").

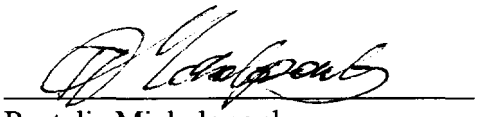
[18] *See, Allocation and Designation of Spectrum for Fixed-Satellite Services in the 37.5-38.5 GHz, 40.5-41.5 GHz, and 48.2-50.2 GHz Frequency Bands; Allocation of Spectrum to Upgrade Fixed and Mobile Allocations in the 40.5-42.5 GHz Frequency Band; Allocation of Spectrum in the 46.9-47.0 GHz Frequency Band for Wireless Services; and Allocation of Spectrum in the 37.0-38.0 GHz and 40.0-40/5 GHz for Government Operations*, 13 FCC Rcd. 24649, 24653 (1998) ("provid[ing] a total of 5.6 GHz of spectrum for wireless services use on a primary basis, by retaining the existing wireless designations in the 38.6-40 GHz and 47.2-48.2 GHz bands, and adding new wireless designations on a primary basis in the 37.0-37.6 GHz, 41.0-42.5 GHz, 46.9-47.0 GHz and 50.4-51.4 GHz bands"); *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, 12 FCC Rcd. 18600, 18613 (1997) (expanding the array of services provided in the 39 GHz band to include point-to-multipoint and mobile operations); *Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, 11 FCC Rcd. 19005, 19025 (1996) ("We designate 1000 MHz of spectrum for LMDS systems in two non-contiguous segments."); *Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service from the 18 GHz band to the 24 GHz Band and To Allocate the 24 GHz Band For Fixed Services, Order*, 12 FCC Rcd. 3471 (1997); *Amendment to Parts 1, 2, 87 and 101 of the Commission's Rules to License Services at 24 GHz, WT Docket No. 99-327, Report and Order*, 15 FCC Rcd. 16934 (2000), FCC 01-151 (rel. May 17, 2001).

IV. CONCLUSION

In sum, the solution of finding a home for Northpoint in the CARS or MMDS spectrum avoids the disenfranchising of DBS subscribers, and at the same time it disposes completely of all concerns voiced by Northpoint regarding alternative spectrum. It opens the door for Northpoint to start implementing its plan and trying to introduce additional competition in the MVPD market. The Commission should consolidate the two proceedings and consider licensing a Northpoint-type service in the CARS band or allow Northpoint to seek licenses in the MMDS spectrum or other bands allocated already to point-to-multipoint fixed services.

The Commission can and should proceed expeditiously in resolving in these issues. The record of these proceedings has been fully developed, and the Commission could promptly set out a process leading to acquisition of licenses by Northpoint or other proponents of the new service in any of the bands discussed here without need for a new spectrum allocation. None of these licenses would likely be for free, but this is because of a judgment that Congress has made.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Pantelis Michalopoulos, hereby certify that on this 3rd day of December, 2001, copies of the Petition were served by hand delivery* or first-class United States mail, postage prepaid, on the following:

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